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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-1819

NORMAN VAUGHN, LARRY J. BROUSSARD AND FREDDIE BROUSSARD, *Petitioners,*

v.

VERMILION CORPORATION, *Respondent.*

On Writ of Certiorari to the Supreme Court of Louisiana

BRIEF FOR THE PETITIONERS

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CITATION TO THE REPORTED OPINION BELOW

The only reported opinion in this case is that of the Louisiana Court of Appeal, Third Circuit, at 356 So. 2d 551, writ denied, 357 So.2d 558.

STATEMENT OF GROUNDS OF JURISDICTION

The Supreme Court of Louisiana denied Relators' Application for Writs of Review to the Court of Appeal, Third Circuit, State of Louisiana, on March 27, 1978. The Louisiana Supreme Court is the highest Court of that state, and its denial of Relators' application was and is a final judgment as contemplated by 28 U.S.C. 1257. Under Louisiana Law, no application for rehearing may be filed as to a denial of an application for writ of review to the Louisiana Supreme Court [See Rule IX, Section 6, "Rules of the Supreme Court of Louisiana," adopted August 31, 1974, effective Jan-

uary 1, 1974, Volume 8, West's Louisiana Statutes Annotated-Revised Statutes].

Jurisdiction of this Court to review that Louisiana Supreme Court decision is conferred by 28 U.S.C. 1257 [3], as Relators here claim rights and privileges under the Constitution and Laws of the United States, primarily Article 1, Section 8, Clause 3, of the Constitution, 33 U.S.C. 403 and the Louisiana Organic Act [2 Stat. 703].

INVOLVED PROVISIONS OF LAW

(1) Article 1, Section 8, Clause 3, Constitution of the United States:

> "The Congress shall have Power To regulate Commerce with foreign Nations, and among the several States. . . ."

(2) 33 U.S.C. 403, which reads, in part, as follows:

> "The creation of any obstructions not affirmatively authorized by Congress to the navigable capacity of any of the waters of the United States is prohibited. . . ."

(3) The Louisiana Organic Act, 2 Stat. 703, which reads in part as follows:

> "It shall be taken as a condition upon which the said state is incorporated in the Union that the . . . navigable . . . waters leading . . . into the Gulf of Mexico, shall be common highways, and forever free, as well to the inhabitants of the said state as to inhabitants of other states. . . ."

QUESTIONS FOR REVIEW

1. Are navigable canals built on private property with private funds, and which join other interstate navigable waterways, "navigable waters of the United States"?

2. Does destruction or impairment of natural navigable waterways through the building of artificial navigable canals entitle citizens to navigate freely upon the resulting artificial waterways?

3. Does a "navigation servitude" embodying a right to public access necessarily arise upon a finding of status as "navigable waters of the United States"?

4. What relationships exist between the "navigation servitude," the right of access, and the Louisiana Organic and Rivers and Harbors Acts?

5. Does the Louisiana Organic Act apply to artificially created navigable waters so as to afford a right of access to citizens?

6. Does the Rivers and Harbors Act prohibit legal obstructions to navigable capacity in the form of state court injunctions prohibiting public use of navigable waterways?

7. Does the destruction of a natural navigable waterway via the building of an artificial navigable waterway constitute an "obstruction to navigable capacity" under the Rivers and Harbors Act, and, furthermore, afford to the citizen a private remedy of access under the Rivers and Harbors and Louisiana Organic Acts?

STATEMENT OF THE CASE

A. Claims, Defense and Proceedings

Vermilion Corporation, Lessee from Exxon Company, U.S.A., of a large portion of the Louisiana wetlands in Vermilion Parish near the Village of Pecan Island [including lands from the Gulf Intracoastal Waterway on the North to the Gulf of Mexico on the South, and from West Chenier Au Tigre Canal on the

East to Rollover Bayou on the West] brought suit in the 15th Judicial District Court for Vermilion Parish, Louisiana, against Relators, Vaughn, Broussard and Broussard, alleging that Relators had "trespassed" on the leasehold via their navigation on and shrimping in Respondent's artificial canal system. This canal system was built by Respondent's predecessors in title on the leasehold.

Relators answered those suits, pleading that these canals are "navigable waters of the United States," subject to a paramount right of use for and on behalf of the public. Relators furthermore alleged that respondent's mere act of filing suit against them for "trespass" constituted an attempt by the Vermilion Corporation to obstruct the "navigable capacity of the navigable waters of the United States," all in violation of Article 1, Section 8, Clause 3, of the Constitution of the United States and of 33 U.S.C. 403.

The case thus presented in the Trial Court a clash between an alleged right of private dominion and control over waterways versus a claim by Relators as citizens and members of the public of a right to use those waterways. The Commerce Clause, "navigation servitude," public right of access, Rivers and Harbors Act and Louisiana Organic Act all bear upon the resolution of this conflict.

Vermilion Corporation filed a Motion for Summary Judgment in the State Trial Court. In reasons of June 7, 1977, the Honorable Trial Judge, Allen Babineaux, granted the Summary Judgment, holding that the canals on the leasehold are private, privately owned, and subject to private control.

On June 22, 1977, the same date upon which Judge Babineaux signed the formal judgment in favor of the Vermilion Corporation, Relators obtained an order of appeal, and their appeal to the Court of Appeal, Third Circuit, State of Louisiana, was timely perfected.

The case was briefed and argued in the Court of Appeal and on February 6, 1978, by Judge Jerome Domengeaux, that court rendered its decision affirming Judge Babineaux' granting of Respondent's Motion for Summary Judgment in all three cases.

Relators applied directly to the Louisiana Supreme Court for the issuance of writ of certiorari of review seeking reversal of the judgments of the Trial Court and of the Court of Appeal, Third Circuit. The Louisiana Supreme Court denied this application on March 27, 1978.

Timely Petition for Certiorari to this Court was filed on June 23, 1978, and granted on February 21, 1979.

B. Statement of Facts

The ancestors in title of the Vermilion Corporation at various times since 1940 built with private funds on their privately owned lands in Vermilion Parish, Louisiana, canals which generally are 60 feet in width by eight feet in depth.

The canal system formed thereby is entirely unitary in that no part of it is sealed or separate from any other part. Furthermore, these canals, from their beginnings on or near the South side of Pecan Island, Louisiana, flow southerly through the Louisiana marshlands a few miles into the Gulf of Mexico, and the canal system otherwise connects with Fresh Water

Bayou and the Gulf Intracoastal Waterway, which are clearly "navigable waters of the United States."

The parties agree that this entire artificial canal system, which is most often referred to by the residents of the area as the "Humble Canal," is subject to tidal fluctuation, and is navigable in fact. It has been regularly used for oil and gas exploration, commercial shrimping, fishing and recreation since its creation.

In the Trial Court, Vermilion Corporation, via its Motion for Summary Judgment, admitted the truth of almost all of the Relators' factual allegations, which supported their claim that the Humble Canal is navigable in law, is in interstate commerce, and thus is part of the "navigable waters of the United States," not subject to private dominion and control.

The only factual allegation made by Relators which Vermilion Corporation disputed in the Courts below was that, in building this artificial canal system, Respondent's ancestors in title had used, impaired, and finally destroyed the factual navigability of certain natural navigable waterways which formerly existed in the area on and across which the Humble Canal now flows.

Specifically, at all times in this litigation, Relators have alleged that the old Fresh Water Bayou,[1] on and prior to the time of the development of the artificial "Humble Canal," existed in a natural state, flowed from a point North of Pecan Island, southerly to the Gulf of Mexico, and was a natural and actual marine

[1] The same applies to "Little Rollover Bayou" on the west end of the canal system.

highway of commerce for the citizens of the Pecan Island area. Indeed, it was the contention of Relators in all Courts below that the old Fresh Water Bayou had been used prior to the development of the artificial "Humble Canal" to transport cattle, groceries, human beings and the United States Mail to and from the Pecan Island area.

Most important, Relators alleged and swore to in affidavits filed in opposition to the Motion for Summary Judgment in the Trial Court, that those natural navigable waterways [particularly Fresh Water Bayou] became unusable only when the Vermilion Corporation's ancestors in title built the artificial navigable waterways in the area.

In short, Relators claimed that natural navigable waterways, once used as such, were impaired and destroyed by the artificial creations of a private corporate developer, and it is this factual assertion which was and is in vehement dispute between the parties.

All Courts below held in effect that, even assuming all facts alleged by Relators to be true, Relators' claims of rights and privileges under the Constitution and laws of the United States are of no moment, as the State of Louisiana views privately developed canals on private lands to be private property, despite their navigability, despite their connection with other maritime highways of commerce, and despite their possibly having destroyed via their creation a pre-existing natural navigable waterway system. To Louisiana, a privately developed canal is a "private thing," and that is all that matters.

ARGUMENT

I.

The "Navigation Servitude"—From Whence It Came, And Where It Went

The Commerce Clause, "navigable waters of the United States," and the public right of access to navigable waters do not embody identical or perhaps constantly and forever inseparable concepts. But as they relate to this litigation they are minutely different from each other.

The desire and need of Englishmen to travel and fish upon their waters gave birth to the "public common of piscary," which in turn produced the concept of "navigable waters." *United States* v. *Kaiser-Aetna,* 408 F.Supp. 42, 48-49, B.C., Hawaii, 1976, affirmed in part and reversed in part and remanded, 584 F.2d 378, 9th Cir., 1978.

The Commerce Clause [Art. 1, § 8, Clause 3 of the Constitution] gives the United States jurisdiction of the surface of navigable waters. *Martin* v. *Waddell's Lessee,* 41 U.S. 367, [1842], and *Harmon* v. *Chicago,* 147 U.S. 411 [1893].

The *Kaiser-Aetna* District Court describes the "navigation servitude" as a "modern declaration of the common law right of access to waters." *ibid.*

Thus, before the Commerce Clause, there was the "navigation servitude" and right of access, and the Constitution through the Commerce Clause transposed those concepts to an American and Federal context, and thus gave to Congress the power to enforce a right of the citizen which was thought to be worthy of preservation and enhancement.

Is the "navigation servitude" simply a vague right of the people and their government which requires specific Congressional action to implement at all, or is the idea of a "navigation servitude" as the patrimony of the citizen so capable of floating on its own bottom as to allow a citizen to make headway without the aid of the application of specific Federal statutory power?

The Government's amicus in response to Appearers' Petition for Certiorari described the public's right of access to waters as "historic," and the thinking of this Court since the early days of the Republic supports the proposition that the Commerce Clause exists, in part, to protect and foster a right to navigate. See *Ray* v. *Atlantic Richfield Co.,* 435 U.S. 151, 173-178 (1978); *Douglas* v. *Seacoast Products, Inc.,* 431 U.S. 265 (1977); *United States* v. *Chandler-Dunbar Co.,* 229 U.S. 53, 69 (1913); *Harmon* v. *Chicago, supra; Gibbons* v. *Ogden,* 22 U.S. (9 Wheat.) 1, 193 (1824).

Is there now any reason left for timidity in viewing the "navigation servitude" as affording a self-executing right of access?

Justice Merrill for the 9th Circuit in *U.S.* v. *Kaiser-Aetna* thought not:

> "In the first place, in our judgment, Federal regulatory authority over navigable waters . . . and the right of public use cannot consistently be separated. It is the public right of navigation or use that renders regulatory control necessary in the public interest.
>
> "Secondly, the Federal navigational servitude and the public right of use are not imposed or appropriated by action of government in the nature of seizure. They exist as characteristics of all navigable waters of the United States."

U.S. v. *Kaiser-Aetna, supra,* Page 383

The public right of navigational use is not thus simply created or rendered potent by Congressional Act or Federal Regulations, but exists "by virtue of the waters' presence." *U.S.* v. *Kaiser-Aetna, supra,* Page 384.

But *Kaiser-Aetna* is not a lone revolutionary voice. *Silver Springs Paradise Co.* v. *Ray,* 50 F.2d 356, 5th Cir., 1931, *Swan Island Club* v. *White,* 114 F.Supp. 95, East. Dist., N. Car. 1953, Aff'd, 209 F.2d 698, 4th Cir., 1954 and this Court in the *Illinois Central* v. *State of Illinois,* 146 U.S. 387 (1892), gave to persons in controversies against parties other than the United States the right to navigate based on the common law as against opponents who claimed dominion of waterways through State grants of title. Thus, the right of access as an outgrowth of the navigation servitude has been thought to have some ability,to survive on ts own.

These private citizens feel that it is time and timely for this Court to hold that the right of access requires no specific executing authority. If maritime highways are "navigable waters of the United States" citizens should be deemed to be more than the possessors of a dormant or impotent right which requires specific Congressional and governmental aid to execute.

The power of the United States over navigable interstate waters under the Commerce Clause generally denies such a power to the states and to citizens—surely power as may be made manifest through state of private dominion and control over navigable waters. To say that that implication of the Commerce Clause should forever be viewed so conservatively as to deny to citizens the right freely to use that which the United States is charged specifically with the obligation to

preserve and protect in the interest of the citizen is to allow the heavy and dead weight of precedent to overcome that which is needed, fair, and legally wholly sound.

The Courts below should thus have held that no private citizen may procure an injunction to prohibit free navigational use of navigable waters by other citizens, and those Courts should have grounded their decision squarely upon the Commerce Clause, the navigation servitude that it embodies and protects, and the public right of access which emanates from the navigation servitude.

II.

Why The Rivers And Harbors And Louisiana Organic Acts?

There may be many answers to that question, but Appearers are interested in only one.

Congress generally has the power to protect the navigation servitude [See *U.S.* v. *Rands,* 389 U.S. 121 (1967), and *U.S.* v. *Rio Grande Irrigation Co.,* 174 U.S. 690 (1889)], and to protect public right of access to navigable waters [See *Ray* v. *Atlantic Richfield Co., supra.*]

It has been held that the Rivers and Harbors Act [33 U.S.C. 401 et seq.] was enacted to protect the navigation servitude. *U.S.* v. *Republic Steel Corp.,* 362 U.S. 482 (1960).

Furthermore, the Louisiana Organic Act [2 Stat. 703], by its specific terms demonstrates recognition of a right of public access, and in absolutely clear terms establishes statutory right of use. See *Hamilton* v. *Vicksburg,* 119 U.S. 280 (1886) and *Silver Springs Paradise Co.* v. *Ray, supra.*

The Rivers and Harbors and Organic Acts thus in an important sense created nothing new. They merely gave the long-established right of the people an emphasis, and new names by which to be known. Although the right of access and navigation servitude need no statutory implementing authority in Appearers' view, these acts nevertheless performed exactly that function.

III.

Navigable Waters Created On Private Lands With Private Funds May Be "Navigable Waters Of The United States" And Burdened With The Navigation Servitude

The parties entirely agree that the Humble Canal System is navigable in fact, and that it connects with various clearly interstate marine highways of commerce and with the Gulf of Mexico.

Vermilion Corporation's canals generally are 60 feet wide by eight feet deep, are subject to tidal fluctuations, and support much oil and gas exploration, commercial fishing and shrimping, and recreation.

The parties also agree that this canal system, except to the extent that it may connect with and thereby in any way involve natural waterways, was and is entirely the creation of private parties, and was done with private funds on private lands.

The Louisiana Courts' view of this matter, as set forth in this case,[2] in *Audubon Society* v. *White,* 302 So.2d 660, La. App. 3rd Cir., 1974, and in *Ilhenny* v. *Broussard,* 172 La. 895, 135 So. 669 (1931), is that navigability in fact, relationship to interstate commerce, and, generally, all other indicators of status

[2] 356 So.2d 551.

as "navigable waters of the United States" are irrelevant if waterways are privately constructed by private parties on privately owned lands.

The courts of Louisiana appear to have been on the wrong side of this issue for an extended time. *United States* v. *Appalachian Electric Power Company,* 311 U.S. 377 [1940], *United States* v. *Sexton Cove Estates, Inc.,* 389 F.Supp. 602, S.D. Fla., 1975, affirmed 526 F.2d 1293 [5th Cir., 1976], and, finally, and, definitively, *U.S.* v. *Kaiser-Aetna, supra,* show that waterways artificially created and which flow over private land may nevertheless be, if they are like those here involved, "navigable waters of the United States," subject to the federal power to regulate and, according to some of the cases previously cited, subject to a right of access and use by the public.

That is as it should be. Louisiana's marshlands are full of hydrocarbon exploration and production canals; Hawaii, Florida, California and other states have their marine, subdivision and resort developments, and, available technological and engineering capabilities, as well as the industrial, recreational and commercial needs of the United States will produce more and more "private" canals connected to navigable waterways. It requires little imagination to see the burden on interstate commerce [let alone the impairment or alteration of other navigable waterways to which these canals are connected] which "private" canals, if unregulated, will cause. There appears to be no good alternative to their being "navigable waters of the United States," and surely no good legal reason for their being otherwise.

IV.

Issues Under The Louisiana Organic Act Are Before The Court

The Louisiana courts were not called upon to determine, and did not determine, the validity of any statute, federal or state, as against constitutional or any other attack. Relators were simply sued by the "owners" of canals for an injunction to prohibit their "trespassing" via use of the canals, and Relators defended, *inter alia,* by saying that an injunction could not be issued to prevent citizens of the United States from using "navigable waters of the United States."

Louisiana's view is very simple, and it is certainly admirable that Judge Jerome Domengeaux of the Louisiana Court of Appeal, Third Circuit, was willing to state his Court's opinion so bluntly:

> "We hold that a canal on private property constructed and maintained with private funds and used for private purposes is a private canal subject to private control."

With regard to "federal law," Judge Domengeaux said:

> "If the public has no right of use on a natural waterway made navigable by private funds under federal law, then *a fortiori* it has no right of use on an artificial navigable waterway constructed with private funds.
>
> "Thus, under state and federal law a canal on private property constructed and maintained with private funds for private purposes is a private canal, the use of which can be restricted by the landowner or his assigns."
>
> *Vermilion Corporation* v. *Vaughn,* 356 So.2d 551, La. App. 3rd Cir., 1978, writ denied, 357 So.2d 558.

The Louisiana Organic Act, 2 Stat. 703, requires *ab initio* a finding of "navigability,"[3] and, as demonstrated in argument *supra,* the Organic Act as it relates to this case is little more than a recognition that the fact of navigability in interstate commerce produces the legal status of "navigable waters of the United States," which, in turn, gives rise to a right of access and use by the public.

The Louisiana Courts simply do not believe that this reasoning, whether based in the Constitution, in the common law or in the federal statutes, has any relationship whatsoever to "private" canals.

Thus, in the most basic way possible, the single most important threshold question which must be dealt with under the Commerce Clause, the common law and the Louisiana Organic Act as the same apply to waterways was addressed by the Louisiana Courts and was answered negatively and erroneously: "Navigability" simply makes no difference to Louisiana in this instance, despite the obvious and agreed fact that these and other hydrocarbon exploration and production canals all over the Louisiana wetlands are navigable in fact and are connected to the Gulf, various rivers, bayous and to the Intracoastal Waterway.

Although it is generally required that the federal question presented in this Court have been passed upon by the state courts below, such requirement is excused if the state courts have in fact considered the question. See *Beecher* v. *Alabama,* 389 U.S. 35 (1967). Here, they slammed the door on the most basic inquiry under the

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[3] ". . . [T]he *navigable* . . . waters leading . . . into the Gulf of Mexico, shall be common highways, and forever free. . . ." 2 Stat. 703 (Emphasis supplied).

Organic Act of all, and thus closed all paths of examination thereunder.

Had the precise name and citation of the Louisiana Organic Act been raised below, the record which was made, and the ultimate questions which were asked, would have been no different from that which was done on both counts through all levels of the Louisiana Court System:

> "Questions not raised below are those on which the record is very likely to be inadequate, since it certainly was not compiled with those questions in mind.
>
> * * * * *
>
> "Even though states are not free to avoid constitutional issues on inadequate state grounds . . . they should be given the first opportunity to consider them."
>
> *Cardinale* v. *State of Louisiana,* 394 U.S. 437, 439 (1969)

This record is not only totally "adequate," but is precisely the same record which would have been brought to this Court even if "Louisiana Organic Act" were stamped all over it. Furthermore, the State of Louisiana was given in this case not only a "first" opportunity, but, considering its jurisprudence, the most recent of many opportunities, to correct its error on the most important initial finding which must be made, and that is that a "navigable" body of water leading to the Gulf of Mexico cannot be a "private thing" simply because it was built on private lands with private funds.

In any event, no particular method of presenting federal issues is required by this Court:

> "Although no particular form of words is necessary to be used in order that the federal question

> may be said to be involved . . . there yet must be something in the case before the State Court which at least would call its attention to the federal question as one that was relied on by the party, and then, if the decision of the Court, while not noticing the question, was such that the judgment was by its necessary effect of denial of the right claimed or referred to, it would be sufficient."
>
> *Dewey* v. *Des Moines,* 173 U.S. 193, 199 (1899)

Finally, this Court has in several cases allowed argument which is closely related to the issues framed and dealt with in the state court. Particularly, one should see *Presbyterian Church in the U.S.* v. *Mary Elizabeth Blue Hull Memorial Presbyterian Church,* 393 U.S. 440, 1969. Also see *Boynton* v. *Commonwealth of Virginia,* 364 U.S. 454, and *Braniff* v. *Nebraska State Board of Equalization and Assessment,* 347 U.S. 590 (1954).

In summary, everything important about the Louisiana Organic Act was dealt with below, factually and legally, and the thoughts of the Louisiana Courts on the subject are clear: Private canals are private canals, and neither constitution, common law, nor statute pierce that fortress.

V.

The Louisiana Organic Act, And "Navigable" Waterways Privately And Artificially Created

The Louisiana Organic Act states:

> "It shall be taken as a condition upon which the said state is incorporated in the Union that the . . . navigable . . . waters leading . . . into the Gulf of Mexico, shall be common highways, and forever

free, as well to the inhabitants of the said state as to the inhabitants of other states. . . ."

2 Stat. 703

Sexton Cove Estates and *Kaiser Aetna, supra,* clearly indicate that waterways artificially created with private funds may nevertheless be, if navigable in fact and in interstate commerce, "navigable waters of the United States."

Is there any reason to assume or conclude that the Organic Act does not apply to waterways so created?

For reasons already discussed, if the Organic Act is merely a statutory recognition of the "navigation servitude" and of the right of access, and if the "navigation servitude" and/or the right of access apply to artificially and privately created waterways as well as to natural ones, the Organic Act should be deemed to apply to artificially and privately created navigable waterways as well.

Furthermore, this Court in *Huse* v. *Glover,* 119 U.S. 543, (1886) inferentially supported the idea that, under statutory schemes similar to the Louisiana Organic Act private parties may not, pursuant to state law authorization, (and *a fortiorari* without same) construct private canals, and thereby render a natural channel unusable, and yet retain exclusive use of the privately created canals.

Accordingly, appearers believe that the Organic Act applies precisely to this case and simply forbids, through the use of a state trespass law, the appropriation of exclusive use of privately created but never theless "navigable" canals.

VI.

The Rivers And Harbors Act

The Rivers and Harbors Act, 33 U.S.C. 402, et seq. prohibits any "obstruction to the navigable capacity" of the navigable waters of the United States. This Court, in *U.S.* v. *Republic Steel, supra,* has determined that the list of prohibited obstructions in the statute is illustrative, and that anything deemed to be an "obstruction" is thus forbidden.

There is, however, no law concerning whether or not the obstruction may be "legal" in nature as well as physical. Here, the claimed obstruction is an injunction issued by a State Court.

Appearers feel that an "obstruction" in injunctive form is as real as a dam, jetty or bridge: They cannot use these waterways as surely as they would not be able to if they were physically blocked or drained. According to the rationale of the Louisiana Courts, neither can any other citizen use those canals if Vermilion Corporation chooses not to allow them to do so, and presumably, the view of the Louisiana Courts is that Vermilion Corporation may refuse, politely or otherwise, the meddlings of the Corps of Engineers with this "private thing."

Huse v. *Glover, supra,* seems inferentially to be premised on the idea that a right of public access [based on a statute similar to the Louisiana Organic Act] in a factual situation generally similar to that at bar may not be impaired via allowing appropriation of exclusive use of a waterway by a private party. A corollary to that holding should be that that right of access may be

asserted as a defense to an action for trespass advanced by any person who pretends to have dominion over a navigable waterway.

Furthermore, there would seem to be ample authority for the proposition that, if one assumes Relators' factual allegations in the courts below to have been true, the destruction of a pre-existing natural navigable waterway system in a part of extreme Southern Louisiana via the building of an artificial system in its place is in itself a forbidden "obstruction" within the meaning of 33 U.S.C. 403, since it at least impaired, and in some cases probably eliminated, the navigable capacity of pre-existing waters. *Sanitary District* v. *U.S.*, 266 U.S. 405 (1925), and *U.S.* v. *Republic Steel, supra,* appear to support petitioner's conclusions in this regard.

However, and finally, does that necessarily mean that Appearers, as opposed to the Corps of Engineers, may assert a right of public access in defense of a suit brought against them for trespass? Does the Rivers and Harbors Act give this power to private citizens?

There is much authority for the proposition that private citizens may seek redress generally under the Rivers and Harbors Act. In *Wyandotte* v. *U.S.*, 389 U.S. 191 (1967), this Court afforded to the Government a right of action for damages as an implied remedy under the Act, and reached that decision via showing that numerous private causes of action have been heretofore held to arise by implication out of various criminal and civil laws. A corollary to *Wyandotte's* rule should thus be that private parties should be treated no differently than the Government as to the right to demand remedies under the Rivers and Harbors Act.

Even more clear are various lower court decisions on this general subject.[4] Under those decisions a private citizen may seek injunctive relief under the Rivers and Harbors Act. Is there any reason to distinguish between an equitable remedy of access, and an equitable remedy of injunction? One should remember in that regard that "access" was no problem until Vermilion Corporation sought to enjoin it.

To view this matter realistically, one should note that Appearers have claimed purely that they cannot be sued for trespass not so much because they have the right of access as because they feel Respondent has no right to exercise private control. Relators did not sue anyone for anything, but were and are simply defending against a claim brought against them which rests upon an allegation of private dominion of navigable waterways. These truly are not merely technical and semantic distinctions designed to circumnavigate the question of whether or not a private party under the Rivers and Harbors Act may claim an equitable remedy of access to a navigable canal system. Although certainly appearers feel that *Dwinel* v. *Bernard,* 28 Me. 554 (1848) provide an admirable and exact model for an appropriate result under the Rivers and Harbors Act [a private right of access], and although *Wyandotte, supra,* would seem to indicate the acceptance of an expansive view of the implied rights and powers of persons other than the government under the Rivers

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[4] *James River and Kanawha Canal Parks, Inc.* v. *Richmond Metropolitan Authority,* 359 F.Supp. 611, 638-640 (E.D. Ca.), aff'd, 481 F.2d 1280, (4th Cir., 1973); *Potomac River Ass'n., Inc.* v. *Lundeberg Maryland Seamanship School, Inc.,* 402 F.Supp. 344, 357 (D. Md. 1975); *Sierra Club* v. *Morton,* 400 F.Supp. 610, 622-624 (N.D. Cal. 1975); *cf. Cort* v. *Ash,* 422 U.S. 66, 78-80 (1975).

and Harbors Act, it is nevertheless true that Appearers' defenses in the State Court did not necessarily rest [although they should] on a finding of a correlative right of access in themselves. The only result necessary here was a finding, in effect, that Vermilion Corporation had no cause of action, or, in federal terminology, failed to state a claim upon which relief could be granted. But, again, to Louisiana none of these ramblings in and about the federal law make any difference: To the Louisiana Courts, the canals are "private," and that totally ends any further inquiry.

Messrs. Vaughn, Broussard and Broussard thus feel that this Court should conclude that, under the Rivers and Harbors Act, Vermilion Corporation had no right to "obstruct" via legal process the navigable capacity of the Humble Canal, and that Appearers were entitled to assert the Act in their own defense, and/or to claim a right of access thereunder.

VII.

The Organic Act Likened To The Rivers And Harbors Act

Just as the diversion or destruction of a natural navigable waterway by the creation of an artificial one in its place should be deemed to be an "obstruction" under the Rivers and Harbors Act, and just as a private party should be entitled to assert defenses which flow from Rivers and Harbors, Appearers should be able also to assert and prevail upon the proposition that the destruction of Fresh Water Bayou, et al by the artificial Humble Canal System, and the then appropriation of exclusive use or dominion of the artificial system by its creator, patently violated the Louisiana Organic Act.

Huse v. *Glover, supra, Wyandotte, supra,* and the lower court cases previously cited with regard to the rights of private parties emanating from the Rivers and Harbors Act, support this contention. Every reason and argument asserted to support the existence of rights in private persons under the Rivers and Harbors Act, and for deeming destruction of natural waters and appropriation of exclusive use of their artificial replacements to be a violation of Rivers and Harbors, should apply superabundantly to the Organic Act.

CONCLUSION

The Humble Canal System, though artificially created with private funds on privately owned land, meets all requirement of navigability, and joins the Gulf of Mexico as well as other navigable waters.

Louisiana thus should not have viewed these canals as "private things," because they are "navigable waters of the United States."

Louisiana never gave Appearers a chance. Summary Judgment was granted in the trial court, even though the agreed facts pointed exclusively to a status as "navigable waters of the United States." Furthermore, the one factual dispute—whether or not the artificial Humble Canal System had destroyed pre-existing natural navigable waterways—made absolutely no difference whatsoever to the Louisiana courts.

Yet, since these waters are "navigable" and are "navigable waters of the United States," under no circumstances was Vermilion Corporation entitled to their exclusive control, and no state court should have aided such a claim via the issuance of injunction. The Commerce Clause, the "navigation servitude," the pub-

lic right of access, the Rivers and Harbors Act, and, finally, the Louisiana Organic Act as the executor of the navigation servitude and right of access, should have prevented and precluded the Vermilion Corporation's claims, and the state courts' aid thereof.

The judgments below should be reversed and Vermilion Corporation's suit, dismissed. However, should the Court feel the agreed facts need further development, or that there needs to be a trial on the issue of whether or not the artificial canals destroyed the pre-existing navigable ones, there should be reversal and remand for trial, consistent with a declaration that the present Humble Canal System is "navigable water of the United States," and that Vermilion Corporation has no right to claim and enforce dominion thereof via injunction or otherwise.

Respectfully submitted,

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